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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/537,631	09/28/2005	William Mercer	11385.24235	6372
24382	7590	11/09/2009	EXAMINER	
JOSEPH S. HEINO, ESQ. DAVIS & KUELTHAU, S.C. 111 E. KILBOURN SUITE 1400 MILWAUKEE, WI 53202-6613			WOMACK, DOMINIQUE A	
			ART UNIT	PAPER NUMBER
			1794	
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			11/09/2009	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/537,631

**Applicant(s)**

MERCER ET AL.

**Examiner**

DOMINIQUE WOMACK

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 July 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/ICE)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Response to Amendment***

1. Claims 1-11 are pending. Claim 11 is newly added. Applicant's amendments filed on 7/02/2009 have been acknowledged.

### ***Claim Objections***

2. Claim 1 is objected to because of the following informalities: the recitation "claim-shell heater" in line 8 of the claim appears to be a typographical error. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. **Claims 1-2, 5, and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938].**

8. Regarding claim 1, Damiano discloses an apparatus for heating a packaged food product. The apparatus is an electrical heating device comprising a heating body. The heating body has a first bottom tray and a second top tray part which are coupled together by a hinge means (pg. 13, lines 25-31). The bottom tray has a general concave shape forming a recipient heating tray part. The top tray cooperates in closure with the bottom tray to define an internal heating housing (pg. 14, lines 7-11). This apparatus is interpreted to read on a clam-shell heater. Furthermore, Damiano discloses a method for heating a packaged food product comprising the steps of:

- a. Providing a heating cavity having heating surfaces;
  - b. Placing a container including the food product into the heating cavity, the container engaging at least a first and second surfaces for heating the food product through conduction of thermal energy to produce a heated food product;
  - c. Opening the container and serving the heated product (pg. 11, lines 20-31).
9. Damiano discloses that the container can be a flexible container such as a heat resistant plastic pouch and that the container can hold frozen food (pg. 17, lines 2-8). Damiano also discloses

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that the container may include venting zones to allow gas and vapor generated during heating (pg. 17, lines 25-26).

10. Regarding claim 1, Damiano fails to disclose pre-forming a food-product having a substantially uniformed pre-determined thickness and sealing the food portion into an envelope formed from a film to produce a package wherein at least one of the seals of the package being peelable under conditions of elevated temperature and pressure within the envelope to vent the envelope during heating.

11. Fisher discloses forming a food product of substantially uniform predetermined thickness by folding a square of uncooked pastry over a filling to form a triangle (col. 3, lines 24-28).

12. Fisher discloses that food products can be sealed in packaging which is self-venting. Thus the steam or vapor generated from the cooking process may exert enough pressure that the selectively releasable seals open sufficiently to permit venting. The release of this vapor aids in the browning and crisping of the food (col. 7 line 63 to col. 8, line 8).

13. It would have been obvious to one of ordinary skill in the art, at the time of the invention, to include the method steps of Fisher in the method of Damiano in order to heat a package that is formed of selective releasable seals. One of ordinary skill in the art would be motivated to heat a package that is formed of selective releasable seals because the release of vapor aids in the browning and crisping of the food contained within the packaged.

14. Regarding claims 2, 5, and 9, Fisher disclose a package comprising a base layer made from a thermally stable film such as polyethylene terephthalate, which has a melting point in the range of 250°-260° C (converted: 482°-500° F) (col. 3, lines 38-46). Fisher further discloses that the base film

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is coated with at least one layer of a heat-releasable thermoplastic polymer that is heat sealable (col.3, lines 50-55).

**15. Claims 3 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938] in further view Wright et al. [US Pat App No. 2001/0036518].**

16. Damiano in view of Fisher is relied upon as above with respect to claim 2.

17. Damiano in view of Fisher fails teach a film with a further layer.

18. Wright discloses a packaging designed to vent during cooking.

19. Wright discloses that an optional barrier layer maybe extruded onto a base layer. The barrier layer, when present, typically provides a grease and moisture barrier and also can provide strength to the container packaging and help prevent damage or tearing. The barrier layer can comprise PET (0021).

20. It would have been obvious to one of ordinary skill in the art, at the time of the invention, to add a barrier layer to the film used in the package of Damiano in view of Fisher in order to add strength to the package. One of ordinary skill in the art would be motivated to add strength to the package because this helps prevent damage to the package.

**21. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938] in further view Kocher [US Pat No. 6,032,800].**

22. Damiano in view of Fisher is relied upon as above with respect to claim 2.

23. Damiano in view of Fisher fails to teach a film wherein a layer of pigment or indicia is laminated within the film material.
24. Kocher discloses a process for inserting a printed image of label between films wherein a film passes through a printing or labeling station prior to being bonded to another film (col. 16, lines 41-44). The printed image and/or label is applied to the surface of the first film (col. 16, lines 44-46). The printed image is trapped between both films and at the interface of the resultant laminate (col. 16, lines 48-50). This process provides a packaged product where information and other important indicia can now be applied to the packaging of the product (col. 16, lines 54-63).
25. It would have been obvious to one of ordinary skill in the art, at the time of the invention, to add a printed image to the package of Damiano in view of Fisher in order to provide product packaging with indicia. One of ordinary skill in the art would be motivated to provide product packaging with indicia because this type of packaging allows consumers to view information and other important indicia regarding the product.
26. **Claims 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938] in further view Fioravanti et al. [US Pat App No. 2001/0046540].**
27. Damiano in view of Fisher is relied upon as above with respect to claim 2.
28. Regarding claim 6, Damiano in view of Fisher fails to disclose a package wherein the envelope has a longitudinal sealed seam and transverse end sealed seams and is of generally pillow-like configuration.
29. Regarding claim 7, Damiano in view of Fisher fails to disclose package wherein the envelope is made in-situ around the food product.

30. Regarding claims 6 and 7, Fioravanti discloses a method for in-situ packaging a food product comprising the steps of wrapping the peelable film around a food product and sealing the product with a longitudinal seam and transversal seals [0051, 0063, 0065]. Figure 4 shows a package with a general pillow-like configuration. Fioravanti discloses that this type of packaging provides an airtight packaging for foodstuffs [0044].

31. It would have been obvious to one of ordinary skill in the art, at the time of the invention, to form longitudinal and traverse seals in the package of Damiano in view of Fisher in order to provide product packaging that is airtight. One of ordinary skill in the art would be motivated to provide product packaging that is airtight because this type of packaging preserves the food product contained within.

32. **Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938] in further view Chalin et al. [US Pat No. 3,873,735].**

33. Damiano in view of Fisher is relied upon as above with respect to claim 2.

34. Regarding claim 8, Damiano in view of Fisher fail to disclose that the food product is cooked before the envelope is formed.

35. Chalin relates to food packaging used for storing, heating and serving food.

36. Chalin discloses packages for cooking or reheating food can contain food, that is either fully cooked or pre-cooked and frozen, requiring only thawing and reheating prior to serving (col. 2, lines 57-60). Chalin discloses that this type of packaged food product drastically reduces effort and manpower needed for the preparation and serving of meals (col. 3, lines 10-12).



37. It would have been obvious to one of ordinary skill in the art, at the time of the invention, to use a cooked food product in the package of Damiano in view of Fisher in order to provide a self-venting product packaging containing a cooked product. One of ordinary skill in the art would be motivated to provide a self-venting product packaging containing a cooked product because Chalin discloses that preparing this type of packaged food drastically reduces effort and manpower needed for the preparation and serving of meals.

38. **Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Damiano et al. [WO 02/067737] in view of Fisher et al. [US Pat No. 4,911,938] in further view Havette et al. [US Pat No. 4,428,971].**

39. Damiano in view of Fisher is relied upon as above with respect to claim 2.

40. Regarding claim 10, Damiano in view of Fisher disclose that the frozen food product is often packaged and frozen before sale (Fisher, col. 3, lines 26-28). Furthermore, Damiano in view of Fisher disclose that frozen food at -20 ° C can be cooked in self-venting packages (Damiano, pg. 24, line 27- pg. 25 line 17).

41. Damiano in view of Fisher fail to disclose that the food package is deep frozen.

42. Havette discloses that filled food packages suitable for reheating, can be deep frozen in a tunnel or plate freezer, at about -35° C (col. 2, lines 63-68).

43. It would have been obvious to one of ordinary skill in the art, at the time of the invention, deep freeze the package of Damiano in view of Fisher in order to provide a deep frozen food package. One of ordinary skill in the art would be motivated to deep freeze the package because Havette discloses that the package is suitable for reheating.

***Response to Arguments***

44. Applicant's arguments filed July 2, 2009 have been fully considered but they are not persuasive. Applicant argues that the food container taught by Damiano (WO 02/067737) necessarily has to have a substantially rigid structure. However, Damiano discloses that the disclosed device is intended for heating food in a flexible container (pg. 13, lines 20-24).

45. Applicant also argues that the device of Damiano does not read on a clam-shell heater. Applicant defines a clam-shell heater as a device that "comprises a pair of heated plates which can be moved between a spaced apart configuration to allow a food product to be loaded onto one of the plates, and a use configuration in which the plates are generally parallel to each other and the food product is sandwiched between the plates. The spacing of the plates in the use configuration is chosen so that the food product is lightly compressed between the plates allowing a high level of heat transfer from the plates to the food product by conduction" (pg. 1 of instant specification). The device of Damiano has two heating surfaces which can be spaced apart to allow a food product to be placed in the heating cavity (pg. 11, lines 20-27). The plates are generally parallel to one another (Fig. 4). The heating surfaces of the device of Damiano tightly fit to the surfaces of the packaged food (pg. 13, lines 18-20). The device of Damiano is interpreted to read on a clam-shell heater as defined by applicant. Furthermore, in response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., clam-shell heater as would be recognized by the skilled reader in the art) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Gemst*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

46. Applicant argues that the packaging of Fisher (US Pat No. 4,911,938) would not maintain its integrity under sustained direct heating applied by conventional clam shell heating. However, the packaging of Fisher would maintain its integrity in the device of Damiano. Damiano discloses that the container for packaging the food product can be made from materials such as PET or reinforced plastic (pg. 17, lines 2-3). The material used in the packaging of Fisher is also PET (col. 3, lines 45-46). Therefore, the packaging of Fisher would not render the device of Damiano inoperable.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

44. Any inquiry concerning this communication or earlier communications from the examiner should be directed to DOMINIQUE WOMACK whose telephone number is (571) 270-7366. The examiner can normally be reached on Monday-Thursday, 9:30am-6:00pm.

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45. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571) 272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

46. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. W./  
Dominique Womack  
Examiner, Art Unit 1794

29 October 2009

/JENNIFER MCNEIL/  
Supervisory Patent Examiner, Art Unit 1794